



**Gary L. Gill-Austern**

Direct Line: 617-439-2250

E-mail: ggill-austern@nutter.com

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**BY E-MAIL & U.S. FIRST CLASS MAIL**

Cynthia E. Catri, Esq.  
U.S. Environmental Protection Agency  
Region 1  
5 Post Office Square  
Suite 100 (OES04-2)  
Boston, Massachusetts 02109-3912

**Re: Aerovox Facility – TSCA Determination**

Dear Ms. Catri:

I write again on behalf of our client AVX Corporation ("AVX") with respect to the applicability of the TSCA Determination to AVX's activities under the Administrative Consent Order and Notice of Responsibility with the Massachusetts Department of Environmental Protection and Office of the Attorney General ("ACO") and in accordance with M.G.L. c. 21E ("21E") and the Massachusetts Contingency Plan ("MCP"). AVX has asked that I respond to your letter of October 25, 2016.

AVX appreciates that EPA's intention is not to slow the progress of the 21E cleanup, which to date has proceeded expeditiously. Demolition of the Aerovox facility was completed ahead of schedule; the 21E/MCP work has met all deadlines, and continues to move forward apace. In a few short years, AVX's remedial accomplishments have already achieved significant improvements over previous conditions. The NTCRA work remains protective and fully compliant with TSCA while the 21E/MCP work proceeds.

AVX also appreciates EPA's acknowledgements that it does not have a direct oversight role in the 21E cleanup, and that its Superfund program's primary means of engagement with respect to the 21E cleanup is not through direct communication with AVX, but through communications with MassDEP, and meetings with MassDEP and AVX. Such statements, are helpful responses to AVX's earlier assertions regarding the agency's role at the site. Taken together, such statements encourage further communications to clarify each party's role at the site. To that end, in the balance of this letter, and with the hope for improved understanding, AVX addresses three aspects of EPA's letter of October 25.

### **No Newly-Discovered Conditions**

EPA admits that the TSCA Determination was intended to provide assurances to AVX that if AVX performed the 21E/MCP work in accordance with the terms of the TSCA Determination, then the work would satisfy TSCA requirements.<sup>1</sup> This confirms AVX's position in our September 2, 2016 letter acknowledging that TSCA compliance was required during 21E activities, but through AVX's adherence to the terms memorialized in the TSCA Determination rather than through EPA's day-to-day invocation of TSCA's authority and the agency's continuing engagement in the activities implemented under 21E.

In spite of this, EPA claims that its agreement to have the TSCA Determination deliver the necessary direction regarding TSCA compliance to AVX's conduct of 21E activities is only as good as EPA's understanding of site conditions at the time and goes so far as to say there are grounds for invoking the AOC reopener, though EPA declines to do so, apparently as a matter of discretion. EPA now claims that "[t]hrough the 21E investigations undertaken by AVX, and sediment sampling conducted in 2012 and 2015 by EPA in the Acushnet River along the Aerovox Site shoreline, information about the presence of DNAPL and off-site migration of PCB contamination has been discovered that now requires the TSCA program to re-evaluate the TSCA Determination."

AVX firmly and unequivocally rejects any suggestion that there are grounds to invoke the AOC reopener, an extreme step from any viewpoint. Unfortunately, EPA failed to review the record which amply demonstrates and undeniably establishes that the very facts that EPA claims to have learned after 2010 were explicitly called out by the record and informed or should have informed EPA's thought processes at the time the TSCA Determination was negotiated and finalized.

To begin with, DNAPL at the facility was observed from the outset. The presence of product at the site is noted in one of the earliest technical documents in the administrative record for the site, i.e., GHR's August 22, 1983 *Technical Specifications and Plans for Remedial Measures, Aerovox Property, New Bedford, MA* (SDMS DocID 56631). DL Maher boring logs for TB-22, TB-22A, TB-24 and TB-26 note "product" from 1-8.5 feet below ground surface ("bgs"), 0-7 feet bgs, 4-7 feet bgs, and 4-6 feet bgs, respectively. GHR boring logs for TB-4 and TB-7 note "oily sand" and "black oily clay" respectively. This data is summarized and presented in a figure attached to a February 15, 2007 email from David Dickerson (SDMS DocID 460575).

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<sup>1</sup> In effect, EPA has dropped its assertion in Kim Tisa's August 29, 2016 email that the TSCA Determination does not apply to the 21E/MCP work.

But more significantly, the Conceptual Site Model developed for EPA explicitly discusses the certain presence of DNAPL at the site. ENSR's March 2006 *Conceptual Site Model*, § 6.0 Potential for PCB Migration as DNAPL states in relevant part:

As PCBs were used at the Aerovox site in the liquid (oil) state, contamination beneath portions of the site likely includes residual pockets or pooled areas of PCB oil. Because the density of the PCB oil is greater than that of water, it is termed dense non-aqueous phase liquid (DNAPL). Given that PCBs have not been in use at the Aerovox site for nearly 30 years, PCBs that exist as DNAPL beneath the site are expected to be in a stable configuration, providing a source of contamination to infiltrating precipitation (if located above the water table) or to passing groundwater (if located below the water table), but not moving as a separate phase liquid. Future demolition activities at the site that include significant vibration or excavation, with potential exposure to increased infiltration, could mobilize PCBs that currently exist as DNAPL pooled beneath the slab of the building. However, any further migration of DNAPL [sic] is expected to be limited in extent given the length of time since PCBs were actively used at the site.

Given the site history and soil and groundwater concentrations, PCBs also likely exist in DNAPL form beneath the capped area between the building and the harbor, potentially residing above the low permeability peat layer. As the sheet-pile wall isolating this area from the harbor deteriorates over time, holes or gaps in the wall could allow for direct discharge of PCB oil into the harbor.

The presence of DNAPL in the subsurface was explicitly called out by AVX in the legal and technical comments on the SEE/CA it submitted to EPA on August 15, 2006. Under the major heading "SEE/CA Does Not Comply with the NCP," and the sub-heading "Recommended alternative does not contribute to efficient performance of any long-term remedial action," AVX cited another selection from the *Conceptual Site Model* that indicated the probability of DNAPL being present in the subsurface:

The historical release of separate phase PCB oil within the building and the surrounding area likely resulted in residual contamination of the soils beneath the site (pockets of oil filling in portions of the interstitial pore space between soil grains) as well as the potential for pools of oil residing above zones of lower permeability material. As the density of the PCB mixtures used at the site was greater than that of water (PCBs are classified as a dense non-aqueous phase liquid or DNAPL), PCB oils that historically drained through the soil could have continued a downward migration below the water table, potentially pooling above

bedrock or the zone of low permeability peat identified beneath the site (confining layer in Figure 1-4) and moving laterally along the rock or peat layer.<sup>2</sup>

The “sediment sampling conducted in 2012 and 2015 by EPA in the Acushnet River” should not be considered a changed condition or newly discovered. EPA’s stated objective for both the 2012 and 2015 sampling efforts was to support remedial planning efforts and fill spatial data gaps. The sampling in 2012 and 2015 confirmed depth and lateral extent of contaminants that EPA already knew existed in the sediment and subtidal area immediately offshore from the Aerovox site. Sampling prior to the original Records of Decision (“ROD”) for OU-1 and OU-2 showed levels of PCB impacts in sediments adjacent to Aerovox in the thousands to tens of thousands of mg/kg. For example, sample location S-1761 was located off shore in the same general area as the 2012 and 2015 effort, just north of the north discharge trough, and contained 100,000 mg/kg of PCBs; similarly, a sample collected at the mouth of the north discharge trough (S-1733a) had 45,000 mg/kg of PCBs (SDMS DocIDs 65327 and 65317). Multiple partial dredging rounds have been undertaken since that time, including the near shore partial dredging rounds in 2006 and 2008 which revealed “very high levels of PCBs and VOCs, particularly trichloroethene (TCE).” Jacobs/ACOE, *Final Technical Memorandum, Summary of Findings, New Bedford Harbor Superfund Site, 2012 Near-Shore Boring Program Adjacent to the Former Aerovox Property*, April 2013. Levels of PCBs and TCE encountered historically offshore from pre-ROD to post 2008 dredging were indicative of DNAPL conditions.

With respect to the off-site migration of PCB contamination, to the extent it is a reference to the PCBs in soil on the Titleist property, AVX refers EPA to the data from as early as 2000-01 indicating reportable concentrations of PCBs on Titleist’s property that EPA recently forwarded to Angela Gallagher at MassDEP and Marilyn Wade at Brown and Caldwell.<sup>3</sup>

In conclusion, there are no newly-discovered site conditions. The nature and magnitude of contaminants in the Acushnet River, the levels indicative of DNAPL and the off-site migration of PCBs have been known to EPA for as long as it has been studying the harbor and are by no means newly-discovered conditions. EPA’s litany of “new” facts ends in the statement that “the Aerovox Site is the primary source of contamination to the New Bedford Harbor Site.” Far from new information, it is hard to imagine a single statement that has been repeated more often since December 1983 when the United States first sued AVX. The record betrays EPA’s failed effort to fix upon an excuse to re-evaluate its risk-based determination under TSCA and to improperly threaten to re-open under CERCLA, to which AVX takes strong exception.

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<sup>2</sup> Page 1-2 of the *Conceptual Site Model*, cited in Gary L. Gill-Austern August 15, 2006 letter to David J. Dickerson regarding “April 2006 Supplemental Engineering Evaluation and Cost Analysis, Former Aerovox Facility, New Bedford, Massachusetts” at 26.

<sup>3</sup> Email from Elaine Stanley to Angela Gallagher and Marilyn Wade, December 5, 2016 (2:02 PM) on the subject “EPA Soil/Sediment Data on the Acushnet Company Property at 700 Belleville Avenue.”

### **The AOC Tightly Constrains EPA's Role During the 21E/MCP Work**

EPA claims that it continues to have a role at the site both during and after the 21E cleanup through the *Administrative Settlement Agreement and Order on Consent* between AVX and EPA ("AOC"). Such role, it states, has two aspects: to ensure the NTCRA work remains protective and compliant with the TSCA Determination; and to ensure its understanding of the 21E cleanup as it informs EPA's actions in planning and implementing the New Bedford Harbor Superfund Site cleanup. Regardless of the degree of interest, depth of concern or sense of obligation EPA may have as to both aspects, all understandable and appropriate, the AOC is completely silent on the second aspect. As to the first aspect, the AOC envisions a tightly-constrained and largely passive role limited to EPA being assured, as called for by the TSCA Determination, that the existing cap/containment barrier components remain intact during the 21E/MCP work.

As stated in our September 2, 2016 letter, since receipt of the Notice of Completion of Work under the AOC in May, 2013, AVX and its representatives have endeavored to maintain open lines of communication with EPA. As enumerated there, AVX and its representatives have met numerous times with EPA, provided independent written notice to EPA with each MCP eDEP submittal, welcomed EPA on site to observe field activities, coordinated such field observations to accommodate EPA schedules, and completed the annual cap inspections and repairs with EPA's participation. None of this however should be interpreted as more than professional courtesy.<sup>4</sup> Repeating the earlier letter's concluding comment in this regard, AVX has at all times sought to work cooperatively to inform and engage EPA, but without compromising the control of the site provided MassDEP and the LSP under 21E and the MCP.

EPA believes that AVX's commitment in Paragraph 67 of the AOC to implement post-removal site controls consistent with the TSCA Determination, particularly as such commitment is memorialized in the reporting obligations in the Maintenance and Monitoring Plan ("MM Plan"), highlights EPA's continuing role as a regulatory agency at the site. Such role, however, is significantly checked and limited by the particulars. The MM Plan does state that AVX will undertake certain activities during the 21E/MCP work necessary to ensure compliance with TSCA. Yet, at the same time, the MM Plan nowhere affords any role to EPA in the process. The MM Plan does not call for EPA representatives to attend any inspection or participate in any activities. Further, with respect to the monitoring and maintenance activities conducted during the 21E cleanup, AVX does not prepare a separate report to send to EPA. Rather, the steps taken

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<sup>4</sup> EPA's October 25, 2016 letter appears to make much of the events that have transpired since EPA provided the Notice of Completion of Work in May 2013 as if they demonstrate AVX's agreement that EPA's post-NTCRA active involvement is sanctioned by the AOC. Had AVX known that EPA would use its cooperative efforts against it, AVX might have paused before taking on such voluntary activities.

are reported to MassDEP as part of the immediately subsequent regular 21E/MCP submittal, with a copy provided to EPA.

The opening section of EPA's October 25, 2016 letter, entitled "Background," contextualizes the Action Memorandum (to which the TSCA Determination is an attachment) as the outgrowth of the 1998 Engineering Evaluation/Cost Analysis and the 2006 Supplemental Engineering Evaluation/Cost Analysis ("SEE/CA"). The letter gives the impression that the Action Memorandum and the TSCA Determination were prepared in advance of the active negotiations between the parties that commenced in February 2008. AVX notes, however, that the two documents were in fact the very last to be finalized, towards the very end of the parties' discussions.<sup>5</sup> In other words, the TSCA Determination was a product of the negotiations rather than an earlier-created document reflecting what EPA might argue is its norm with respect to TSCA and its jurisdictional reach.

There is, however, another Aerovox-related TSCA Determination that reflects such mindset, and provides a stark comparison. The 2006 SEE/CA included as Attachment 3 a proposed TSCA Determination that, like the TSCA Determination appended to the Action Memorandum, envisioned that the site would transfer to the 21E program upon completion of the demolition. In this instance, however, the 2006 TSCA Determination states that the "final closure plan shall be implemented in accordance with chapter 21E and the federal TSCA program" (emphasis added). Had the parties included a statement such as this in the now effective TSCA Determination, EPA might be able to argue it has a continuing role. The parties did not, and there is no basis for EPA to advance such argument.

### **TSCA and the TSCA Determination**

The third and final topic to be addressed is the breadth of the TSCA Determination's reach. After further review of the TSCA Determination and the record of the 2008-10 negotiations, it is clear that the TSCA Determination applies not only to the Aerovox property but also to "any additional area capped pursuant to the Massachusetts 21E program."<sup>6</sup> Effectively, this precludes EPA from asserting any TSCA jurisdiction independent of the TSCA Determination with respect to the Aerovox and Precix properties, all of which are or will be capped and will fully comply with the TSCA Determination. It does not appear, however, that AVX can argue that the TSCA Determination governs activities on the Titleist property, solely because the property owner has recently indicated that it does not want an asphalt cap installed and is not willing to implement institutional controls, both conditions required by the TSCA

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<sup>5</sup> Negotiations were substantially concluded when the TSCA Determination was signed on December 24, 2009, and the Action Memorandum on January 27, 2010. AVX signed the AOC shortly thereafter, on March 16, 2010. The AOC's effective date is June 3, 2010.

<sup>6</sup> TSCA Determination, ¶ 6.

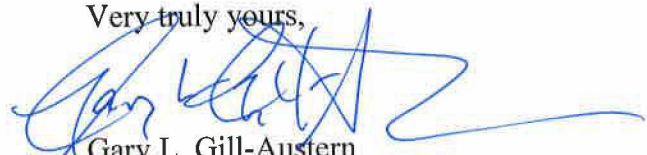
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Determination. Therefore, EPA may legitimately call for independent review, comment and approval of the remedial activities being conducted by AVX on the Titleist property.

In closing, please be advised some of the issues raised in the TSCA program's letter of November 1, 2016 have been addressed in a November 17, 2016 telephone conversation between Marilyn Wade, AVX's LSP, and Kim Tisa, EPA's PCB Coordinator, other matters were discussed at the December 8, 2016 meeting at MassDEP, and the remaining issues will be addressed in the forthcoming revised Phase III.

Please do not hesitate to call if you have any questions or wish to discuss anything raised by the above.

Very truly yours,



Gary L. Gill-Austern

cc (by email):

Ginny Lombardo, EPA  
Elaine Stanley, EPA  
Kimberly Tisa, EPA  
Gerard Martin, MassDEP  
Angela Gallagher, MassDEP  
Michele S.W. Paul, City  
Marilyn Wade, PE, LSP  
Evan Slavitt, Esq.  
Mary K. Ryan, Esq.